89-795

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO_____

C. SAMUEL WEST

PETITIONER

v.

INTERNAL REVENUE SERVICE et.al.

RESPONDENTS

Petition for Writ of Certiorari
to the U.S. Court of Appeals
For the Tenth Circuit

C. Samuel West,
Pro-Se
244 S. Inglewood Dr.
Orem, Utah 84058
1-801-226-6634

30 pp

Questions Presented For Review

1. Whether the dismissal in the instant case was clearly contrary to the rulings of the captioned court?

2. Whether the position taken by the Respondent through the Justice Dept., and the executive branch of the Federal Government, and and the Appellate Court's "Affirmance" of that position violates the doctrine of "The Separation of the Powers Of The Federal Government?

3. Whether the denial of redress with respect to taxes violates "the right to redress" in light of the Petitioner's long standing non-taxable Status which is recognized by Title 26, Sec. 508(c)(1)(A) of the IRS Code, and 1.508-1(a)(3)(a)(4) of the IRS Regulations, which states that "Religious Entities" such as "churches," "Religious Schools," etc. have a "Mandatory Exception" to 501(c)(3)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, C. Samuel West respectfully prays that this captioned court will issue its Writ of Certiorari to Review the Judgment of the United States Court of Appeals, for the Tenth Circuit that was entered on July 26, 1989.

OPINION BELOW:

The Court of Appeals entered its judgment affirming the "Dismissal" of the District Court of the District of Utah. A copy of the Appellate Court's Affirmance and is herewith attached as appendix "A".

JURISDICTION

The jurisdiction of this court is conferred upon the captioned court consistent with Title 28 United States Code, Section 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment One:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 5:

> "Nor shall any person be deprived of life, liberty or property, without due process or law;" also,

Amendment 14:

> "Nor shall any state deprive any person of life, liberty or property without due process of law. Nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

Title 28, Section 2201 U.S. Code:

> "Any case of actual controversy within its jurisdiction, except with respect to federal taxes other than actions brought under 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of Title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

STATEMENT OF THE CASE:

On July 11, 1988, the U.S. District Court adopted the United States Magistrate's "Report and Recommendation" that the instant litigation be "dismissed" for lack of "subject-matter jurisdiction," and on July 26, 1989, the tenth (10th) Circuit Court of Appeals "Affirmed" it.

The instant timely Petition for Review is herewith respectfully submitted:

REASONS FOR GRANTING THE WRIT:

POINT I

The summary dismissal that was granted in

the instant case and affirmed by the United states Court of Appeals for the Tenth Circuit is not in harmony with the rulings of this court, and for such specific reason the affirmance should not be allowed to stand.

In support of the foregoing contention, the Petitioner respectfully refers attention to the following expressed guidelines of this court which must be followed before it can be reasonably concluded (at law) that a dismissal is not a constitutionally impermissible arbitrary act, and therefore violative of the Federal Constitutional Guarantee of "Due Process Of Law" under the 5th and 14th amendments of the Federal Constitution. (Accord: Dent v. State of West Virginia, 129 U.S. 114 (1890).

Those pre-requisites to a valid dismissal of a complaint are spelled out by the captioned Court as follows:

> "In appraising the sufficiency of a complaint we follow of course the accepted

rule that the complaint shall not be dismissed unless it appears beyond a reasonable doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." cf. Carnley v. Gibson, 355 U.S. 41 (1957)

And seventeen (17) years later the captioned court added...

"all allegations must be construed in favor of the Plaintiff." Scheuer v. Rhodes, 416 U.S. 232 (1974)

Inasmuch as Declaratory Relief is available under provisions of 28 U.S.C. Section 2201 regardless of whether or not there is "any other remedy", it would appear to reasonably follow therefrom that contrary to the directives of the captioned court,...when considering the arbitrary dismissal of the Petitioner's complaint, it can be reasonable asserted that "Justice does not satisfy the appearance of Justice" (Offutt v. United States, 348 U.S. 11 (1955) in the instant case and the apparent inability to "hold the line straight and true between the Plaintiff and the Respondent" should have resulted in a voluntary recusal consistent with the late Mr. Justice

Black's portion that:

> "Under our system of Government, we have endeavored to prevent even the probability of unfairness." cf. IN RE Murchison, 349 U.S. 133 (1955).

POINT II

If this Honorable Court were to grant its review of the Appellate court's "Affirmance" of the lower court's arbitrary dismissal in the instant case, and examine the substance as opposed to form consistent with its majority opinion in United States v. Morgan, 346 U.S. 1 (1955), it would immediately become readily apparent to this Honorable Court that a summary and arbitrary dismissal is being employed as an obvious admission of (A) the inability of the Respondents to rebut the Petitioner's long standing Non-Taxable Status, (despite of his always voluntarily, but mistakenly paying taxes until the time of this instant litigation, which is when the Petitioner declared that his Non-Secular Activities are totally outside the purview of the IRS.) and (B) the Respondent's

conspicuous refusal to confess error as to the Non-Tax Liability of the Petitioner's long well-established full-time and exclusive non-taxable religious, charitable and educational activities as a Health Missionary, serving the people on a "donation basis," and being totally supported by donations from (The I.A.L.) The International Academy Of Lymphology; whose Non-Secular activities clearly and unmistakably fall under the classification of a "church;" which is why The I.A.L. was filed with the State Of Utah on February 24, 1987 as a Non-Denominational Religious Entity; and this is why the Petitioner has been proclaiming from the very beginning of this case that his Non-Secular Activities, and the Non-Secular Activities of The I.A.L. are protected from being under the jurisdiction of the IRS by the Federal Constitution in the First Amendment's Free Exercise Clause; and the petitioner believes that the Respondents knew all along that the legal claim to the First Amendment

Non-Taxable Status for The I.A.L. and this Petitioner, is confirmed by Title 26, section 508(c)(1)(A) of the IRS Code and 1.508-1(a)(3)(a)(4) of the IRS Regulations, which is their First Amendment "Mandatory Exception" to 501(c)(3); and therefore the full-time Non-Secular activities of The I.A.L. and the Petitioner, are not under the purview of the IRS - as legally claimed by the petitioner from the beginning.

POINT III

The Petitioner respectfully submits that the appendixed copy of the "Affirmance" of the United States Court of Appeals for the Tenth Circuit does not address the merits of the substance but appears misled by the diversionary tactic employed by the Respondent in claiming the court was without subject-matter jurisdiction". This charge is based upon the false assumption that the pre-requisites to invoking the trial court's "subject-matter jurisdiction had not [yet] been

satisfied by the Petitioner; when in reality, (as stated above), the Petitioner already had an existing Non-Taxable Status was not subject to the purview of the IRS. Therefore, the relief sought by filing the "Petition for a Declaratory Judgment" in the United States District court was a proper and legal First Amendment action, and it is one that should not have been lightly and arbitrarily dismissed; for it can be enforced by Title 18, Sec. 241, 242 and by Title 42, Sec. 1983 of the U.S.C.!

POINT IV

Also, the above obvious diversionary maneuvers on the part of the Respondent, overlooks the very language and intent of the congress of the United States in its enactment of the provisions of Title 28, Section 2201 United States Code, and therein expressly authorizing the District Courts to entertain Petitions for Declaratory Relief...even if there may be..."other remedies" available; and the U.S. Congress, (to protect the Non-Taxable

Activities that pertain to the First Amendment's Free Exercise Clause), did not make any exception as to administrative or any other special alternative remedies, but expressly approved the unfettered authority of the District Courts to proceed on questions of Declaratory Judgments despite such "other remedies."

Above all, the Justice Department and hence the Executive branch of Federal Government, would clearly appear to be in violation of the doctrine of "Separation Of Powers," (and this could also cause a serious violation of "Due process of law," and the "right to obtain redress" guaranteed by the Federal Constitution in the First Amendment's Free Exercise Clause) if the Executive Branch of The Federal Government were allowed to encroach into the exclusive province of the Legislative Branch of The United States Congress and suggest a constructive amendment of the provisions of 28 U.S.C. Sec. 2201 to

bar the District court from according Declaratory Relief "until" the Executive Department's version of "Subject-matter Jurisdiction" is complied with and the Judicial Branch of the Federal Government as represented at the Tenth (10th) Circuit Court would appear equally at fault along with the encroachment of the Executive Branch of Federal Government by "Affirming" the Executive Department's (Justice Dept's) constructive amendment of the provisions of 28 U.S.C. Sec. 2201 U.C.A. by which the District Courts are limited from according Declaratory Relief except as such terms as the Executive Branch of Federal Government (The Justice Dept.) states that the "Subject-matter jurisdiction" of the District Courts is invoked for Declaratory Judgment purposes.

It is respectfully submitted that neither the Justice Dept., individually nor in conjunction with the lower courts are authorized to encroach into the exclusive

province of the Legislative Branch of Federal Government and Constructively Amend the provisions of Title 28, Section 2201 United States Code to encompass only such litigation as the Justice Dept. (Executive Branch of Federal Government) deems to be proper "subject-matter."

POINT V

Relative to such attempted constructive amendment of Congressional legislation (at 28 U.S.C. 2201) by the Respondent, the Petitioner respectfully contends that the rationale of this court's expressed position as to crimes should also apply in this civil proceeding.

In Alpers AND Fasulo this court has ruled:

> "There are no constructive crimes." United States v. Alpers, 328 U.S. 680 (1950); "And the courts cannot, by construction, make that a crime which has not been enacted into law." Fasulo v. United States, 273 U.S. 620

Applied to civil proceedings there should be no constructive circumventions of the Federally protected Separation of the Powers of

Federal Branches of Government (ie, Legislative, Judicial, and Executive) and no branch of Government should be allowed to exercise a function which appertains to one of the other branches of Government as occurred in the instant case wherein:

1. The Executive Branch of Federal Government through its Justice Dept. took the erroneous constructively amendment of 28 U.S.C. Sec. 2201 Self-Serving position that the Courts were "Without subject-matter jurisdiction to entertain the Petitioner's Application for Declaratory Relief.

2. The lower courts dismissed the said application in concurrence with said "Executive Dept. Amendment of the provisions of 28 U.S.C. Sec. 2201.

3. The United States Court of Appeals for the tenth (10th) Circuit "Affirmed" the said Constitutionally impermissible dismissal - Carnley V. Gibson, Supra, in Violation of the Doctrine of Separation of Powers;" and also in violation of the other Constitutionally protected rights of the Petitioner as stated above.

POINT VI

From such obvious unconstitutionality, it must reasonably follow that "fair play" which has been declared to be at the heart of Due

Process of Law (Galvan v. Press, 347 U.S. 522 (1947), was Non-Existent in the disposition of the instant litigation and indeed "Justice does not satisfy the appearance of Justice." (Offutt v. United, 348 U.S., 11 (1955), and "the Major test of true Democracy which is the fair administration of Justice" (Sacher v. United States, 343 U.S. 1 (1952) has not been passed in the proceedings of the instant case and for such specific reasons the affirmance of the United States Court of Appeals for the tenth (10th) circuit should not be allowed to stand.

CONCLUSIONS

The Petitioner prays that based upon the foregoing, the captioned court will grant its review of the judgment of the United States Court of Appeals for the Tenth Circuit.

Dated this 19TH day of October, 1989

Respectfully Submitted,

C. Samuel West

C. Samuel West - Pro-Se and
full-time Health Missionary for The
International Academy Of Lymphology,
a Non-Denominational Religious Entity
in The Temporal Kingdom Of God.
1-801-226-6634

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of November, 1989, I mailed three true and correct copies of this "Petition for Certiorari" and was mailed, postage prepaid, to: Dee V. Benson U.S. Attorney, Room 476, U. S. Courthouse, 350 S. Main St. SLC, Ut. 84101; Kirk C. Lusty, William S. Rose, Jr. Assistant Attorney General, Gary R. Allen, William A. Whitledge, and Joan I. Oppenheimer Attorneys, Tax Division, Department of Justice, Post Office Box 502, Washington, D.C. 20044; Kenneth W. Starr, Solicitor General of the United States, Dept of Justice, Wash. D.C., 20530; and 40 copies to Joseph F. Spaniol Jr., Clerk of the United States Supreme Court, One First Street N.E., Washington D.C., 20530.

Corwin A. West
Corwin Allen West

SUBSCRIBED and SWORN to before me this 9 day of November, 1989.

Elayne J. Butler
Notary Public
Residing at: Orem, Utah

My commission expires: 9-22-92

NOTARY PUBLIC
Comm Exp. 9-22-92
ELAYNE BUTLER
185 S. State
Orem, UT
84058
STATE OF UTAH

A P P E N D I X

A. Report & Recommendation of the United States District Court for the District of Utah, Central Division.

B. Order accepting report and recommendation of Magistrate.

C. The Court of Appeals judgement affirming the Dismissal of the District Court of the District of Utah.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C. SAMUEL WEST	)	REPORT
	)	&
Plaintiff,	)	RECOMMENDATION
v.	)	
	)	Civil No.
INTERNAL REVENUE SERVICE	)	87-C-1030W
	)	

The plaintiff seeks a declaration that an IRS audit violates his constitutional rights and that he is not subject to taxation. The IRS has moved to dismiss for lack of personal and subject matter jurisdiction. The magistrate heard argument on the motion on April 14, 1988. Kirk Lusty represented the IRS by telephone. The plaintiff appeared pro se.

Personal jurisdiction

Service upon officers or agencies of the

United States is governed by Rules 4(d) (4) & 4(d)(5) of the Federal Rules of Civil Procedure, which require that service be effected by:

> delivering a copy of the summons and complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney...and by sending a copy...by...mail to the Attorney General of the United States.

In this case, a copy of the summons and complaint was simply mailed to the IRS.

Unless the lack of proper service is waived, an action may be dismissed when the requirements of Rules 4(d)(4) and 4(d)(5) are not met. Smith v. McNamara, 395 F.2d 896 (10th Cir. 1968), cert. denied, 394 U.S. 934 (1969). There is no evidence of waiver here and, furthermore, Congress has barred federal courts from granting declaratory judgments in this kind of tax matters.

Declaratory Judgment Act

The plaintiff argues that subject matter jurisdiction is based on the Declaratory Judgment Act, 28 U.S.C. § 2201. Actually, That Act "is not a grant of jurisdiction to the federal courts. It merely makes available an additional remedy in cases of which they have jurisdiction by virtue or diversity ...or...a federal question." C. Wright, Law of Federal Courts 674 (4th Ed. 1983); McCarthy v. Marshall, 723 F.2d 1034, 1036 (1st Cir. 1983).

On the other hand, the Act has been interpreted as barring declaratory relief in most tax matters. Handeland v. C.I.R., 519 F.2d 327, 329 (9th Cir. 1975). By its language, the Act permits declaratory relief in "a case of actual controversy... except with respect to Federal taxes...." 28 U.S.C. § 2201.

The exception extends not only to declarations that certain federal taxes are

inapplicable to parties, but also to declarations which would have the effect of restraining assessment or collection of taxes. Life Science Church v. Internal Revenue service, 525 F.Supp. 399, 403 (N.D.Cal. 1981). Cf., Joslin v. Secretary of Dept. of Treasury, 616 F.Supp. 1023 (D. Utah 1985) [Declaratory relief that would affect neither the amount of tax which the government would collect nor the method and manner by which it would be collected, is not barred.]

A declaration that an audit of the plaintiff is unconstitutional would have the effect of restraining assessment or collection of taxes. As the court in explained in Life Science Church,

> Clearly, a declaration that defendant's investigation of plaintiffs' tax status is illegal would have the consequence of prohibiting that investigation. This would effectively preclude the IRS from assessing and collecting taxes due, if any, from plaintiffs. Such a result is precluded by the declaratory judgment act.

525 F.Supp. at 403.

For this reason, the magistrate recommends that the plaintiff's complaint be dismissed. Of course, dismissal would not deprive the plaintiff of all remedies. If a deficiency is assessed against him, he may contest the deficiency in Tax Court or pay the tax and sue for a refund in this court.

Copies of this Report and Recommendation are being mailed to the parties, who are hereby notified that they must file any objections within ten (10) days of receipt.

DATED this 19th Day of May, 1988.

BY THE COURT:

/S/ Calvin Gould
United States Magistrate

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C. SAMUEL WEST Plaintiff, -vs- INTERNAL REVENUE SERVICE Defendant.	)	ORDER ACCEPTING REPORT AND RECOMMENDATION OF MAGISTRATE Civil No. 87-C-1030W

This matter was referred to the United States Magistrate, pursuant to 28 U.S.C § 636(b)(1)(B). Pursuant to that provision, the magistrate conducted a hearing on the Government's motion to dismiss the complaint on April 14, 1988. The magistrate issued his Report and Recommendation on May 19, 1988 and recommended that the plaintiff's action be dismissed for lack of subject matter jurisdiction.

The court has carefully considered the

objection to Report and Recommendation filed by the plaintiff on May 31, 1988. The court has made a de novo review of all matters to which the plaintiff has objected and, in fact, has made a de novo review of the entire file. Based thereon, it is the opinion of the court that the magistrate has properly and thoroughly analyzed the law and the facts relating to the Government's motion to dismiss the complaint.

Accordingly, IT IS HEREBY ORDERED that the Report and Recommendation of the magistrate is accepted in full. The Plaintiff's complaint seeking a declaratory judgment is dismissed with prejudice for lack of subject matter jurisdiction.

Dated this 11th day of July, 1988.

/S/ David K. Winder
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

C. SAMUEL WEST Plaintiff-Appellant, -vs- INTERNAL REVENUE SERVICE CAROL M. FAYE, Director, Defendants-Appellees.	)	No. 88-2272 (D.C. No. 87-C-1030W) (D. Utah)

ORDER AND JUDGMENT*

Before HOLLOWAY, Chief Judge, SETH and BARRETT, Circuit Judges.

After examining the briefs and appellate

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

C. Samuel West appeals from the district court's dismissal of his declaratory judgment. We affirm.

Mr. West is President of the International Academy of Lymphology, whose purpose he states is to teach "the Health Laws of God and other Non-Secular Teachings that are presented in the Non-Secular Science called The Art of lymphasizing." The Internal Revenue Service gave notice to Mr. West that it would initiate an audit of taxpayer's federal income tax liabilities for the year 1984. Mr. West responded to the notice by bringing suit against the Internal Revenue Service. He sought a declaratory judgment to the effect that his "Non-Secular Science of

Lymphology" is a tax-exempt entity, and that the IRS audit of his tax returns violated his First Amendment rights. On the government's motion, the district court dismissed Mr. West's complaint with prejudice for lack of subject matter jurisdiction. The dismissal was also for lack of personal jurisdiction because there had been no proper service.

Mr. West represented himself below and does so on appeal. His pleadings were and are liberally construed. However, suffice it to say that he seeks declaratory relief, which is governed in the federal courts by the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. However, controversies over federal taxes are expressly excluded from the Declaratory Judgment Act, 28 U.S.C. § 2201; see Bob Jones Univ. V. Simon, 416 U.S. 725, 732 n.7. Mr. West does not argue that, he is entitled to any one of the three narrow statutory exceptions to this rule, which are inapplicable here.

Mr. West essentially argues that, because he pursues this matter pro se, he is somehow excused from the requirements of establishing subject matter jurisdiction and personal jurisdiction. He has failed to comply with the sensible and liberal provisions of Rule 4(d)(5), governing service of process on federal agencies. He has ignored the applicable substantive law, and misconstrues the substantive law that he does cite. We must agree with the action taken by the trial court.

AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

Oliver Seth
Circuit Judge